EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

DISTRIBUTED
JAN 26 1989

Supreme Court, U.S.
FILED
JAN 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1043

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,

-v-

MICHAEL ALBERT CERVI,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, MICHAEL ALBERT CERVI, , by and through his undersigned counsel, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of fees and costs, and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A."

Respectfully submitted,

JAMES M. DOYLE
124-121 Warren
Roxbury, Massachusetts 02119
(617) 445-5640

ATTORNEY(S) FOR PETITIONER

No. 88-1043

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,

-v-

MICHAEL ALBERT CERVI,

Respondent.

AFFIDAVIT OF POVERTY

I, MICHAEL ALBERT CERVI, declare that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor, and that I believe that I am entitled to relief.

1. Are you employed? Yes _____ No X

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____

   b. If the answer is "no," state the date of last employment, and the amount of salary and wages per month which you received. U.S. Navy $400.00 Month 1977 Feb.

2. Have you received within the last twelve months any money from the following sources?

   a. Business, profession or form of self-employment? Yes___ No✓
   b. Rent payments, interest, or dividends? Yes___ No✓
   c. Pensions, annuities, or life insurance payments? Yes___ No✓
   d. Gifts or inheritances? Yes✓ No___
   e. Any other sources? Yes___ No✓

3. Do you own any cash, or do you have any money in any checking or savings account?

Yes X No _____ (Include any funds in prison account)
If the answer is "yes," state the total value of the items owned. $56.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes _____ No ✓

If the answer is "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute to their support. None

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

MICHAEL ALBERT CERVI

Sworn to and subscribed before me,

this the 19th day of January, 1989.

Harriet P. Morris
Notary Public

My Commission expires:

Notary Public, Fulton County, Georgia
My Commission Expires May 30, 1990

CERTIFICATE

I hereby certify that Petitioner, MICHAEL ALBERT CERVI, EF-125872, has the sum of $ 56.00 on account to his credit at the Georgia Diagnostic and Classification Center where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said Georgia Diagnostic and Classification Center.

None to my knowledge

June S. Rollingsworth

Authorized Officer of Institution

No. 88-1043

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WALTER ZANT, WARDEN

Petitioner

V.

MICHAEL ALBERT CERVI,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES M. DOYLE
124-126 Warren Street
Roxbury, MA 02119
Counsel of Record for
Respondent

GEORGE H. KENDALL
99 Hudson Street
New York, NY 11103
Counsel for Respondent

January 20, 1989

QUESTION PRESENTED

When a prisoner in uninterrupted custody unambiguously and without qualification requests counsel and obtains the appointment of counsel, may the authorities initiate an interrogation and elicit a confession while physically barring counsel from meeting his client?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES..... iii

STATEMENT OF FACTS.....1

REASON FOR DENYING THE WRIT

I. THE COURT OF APPEALS APPLIED THE WELL-SETTLED RULE OF EDWARDS V. ARIZONA TO UNDISPUTED FACTS.....3

CONCLUSION.....7

CERTIFICATE OF SERVICE.....8

TABLE OF AUTHORITIES

Arizona v. Roberson, ___U.S.___,
108 S.Ct. 293 (1988).....1

Cervi v. Kemp, 855 F.2d 702 (1988).....1

Edwards v. Arizona, 451 U.S. 477 (1981).....4

Moran v. Burbine, 475 U.S. 412 (1986).....6

Shea v. Louisiana, 470 U.S. 51 (1985).....4

Smith v. Illinois, 69 U.S. 91 (1984).....4

Solem v. Stumes, 465 U.S. 638 (1984).....4

No. 88-1013

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WALTER ZANT, WARDEN,

Petitioner,

V.

MICHAEL ALBERT CERVI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF FACTS

A more reliable and more cogent statement of facts than that contained in the Petition is provided in the opinion of the Court of Appeals, Cervi v. Kemp, 855 F.2d 702 (11th Cir. 1988), from which the following account is drawn.

On the morning of March 3, 1977, Iowa State Trooper James Brumbaugh stopped a car for speeding in Mills County, Iowa. Cervi was driving the car, his companion, Wilson, (who received a life sentence and did not appeal), was in the back seat. The Trooper learned that Cervi and Wilson were wanted for murder in Georgia, arrested them and brought them to the Mills County Jail. During the afternoon of March 3, Cervi was brought before

an Iowa magistrate. When the magistrate asked whether Cervi wanted counsel, Cervi answered yes. The proceedings were adjourned until counsel could be obtained. Shortly thereafter, the Iowa prosecutor contacted a local defense attorney who was then appointed by the magistrate. The matter was adjourned until the following morning.

At some time before 9:30 the next morning Georgia authorities arrived at the Mills County Sheriff's Office. At their request, Cervi was brought to the sheriff's office from the jail, a seperate building, a short distance away. At 9:30, the Georgia Bureau of Investigation official took Cervi to a private room, near the sheriff's office. Cervi was read his Miranda rights, and for a period of "approximately 30 minutes" given a summary of the evidence against him by the agent. At 10:06 the agent began to transcribe Cervi's confession, which Cervi signed at 10:56.

During this time, beginning at 9:15, Cervi's appointed counsel was trying to reach his client. He made two requests to the Mills County Sheriff. At 9:30, counsel made similar requests to the Iowa and Georgia District Attorneys, which he repeated at 9:45. The prosecutors persisted in their refusal to interrupt the police interrogation.

Within the hour, an extradition hearing was held, and the events surrounding the confession were put on the record, including

defense counsel's repeated requests for access to his client. Cervi then waived extradition, returned to Georgia, was tried, convicted, and sentenced to death.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS APPLIED THE WELL-SETTLED RULE OF EDWARDS V. ARIZONA TO UNDISPUTED FACTS.

When Petitioner asks that this Court grant certiorari to consider "the application if any, of the prophylactic rule of Edwards upon extradition proceedings", (Petition, at 14) he demonstrates a fundamental misunderstanding of the Edwards rule itself and of its straightforward application to this case by the Court of Appeals.

Edwards does not require the pendency of any particular sort of proceeding. In fact, the Edwards rule is concerned with the consequences of custody itself, not, as Petitioner seems to believe, with those of "the initiation of criminal proceedings." (Petition at 14) The petition is written as though this were a case in which a suspect not in custody was afforded special rights because of the pendency of an extradition hearing. Since the facts of this case are otherwise, however, the petition's approach is unfair to the Court of Appeals. Mr. Cervi received no specially extended protections by virtue of a pending extradition hearing; the Court of Appeals simply recognized that he was entitled to the protections afforded every suspect in custody.

Those protections are succinctly set out in Edwards and have been reaffirmed at every oppurtunity: an accused in custody, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police." Edwards v. Arizona, 451 U.S. 477, 484-485 (1981). See also, Arizona v. Roberson, ___U.S.___, 108 S.Ct. 2093 (1988); Shea v. Louisiana, 470 U.S. 51 (1985); Smith v. Illinois, 469 U.S. 91 (1984); Solem v. Stumes, 465 U.S. 638 (1984). The unanimous panel of the Eleventh Circuit (indeed, the unanimous Eleventh Circuit, no judge having requested even a poll concerning rehearing, Pet. Appendix D), merely stated the obvious by holding that "Under these facts, the Edwards violation is clear." Pet.App. at 9. A brief review of the facts will indicate how clear.

First, it is undisputed that Cervi was in custody between the time of his arrest and the time of his confession. This custody entitled him to the protections outlined in Edwards. Second, it is also clear, as the Court of Appeals held, that Cervi "unequivocally" requested counsel and that an Iowa magistrate appointed counsel and recessed the proceedings to permit Cervi to consult his appointed lawyer. Pet.App. at 18-19. Third, Cervi

did nothing which could be construed as an initiation of the conversations with the authorities.

Finally, the authorities willfully barred Cervi's appointed counsel from advising his client before the confession occurred and without notifying Cervi of counsel's presence. When the Petition refers to the fact that the "interview" had already begun when counsel was first barred it attempts to elide the fact that the confession was not elicited until the interview had been underway according to the interrogating officer, for "[A]pproximately thirty minutes." In other words, the Petition obscures the fact that Cervi's lawyer was intentionally prevented from advising him before the confession was made. Pet.App. at 13.

The Petition betrays a pervasive confusion concerning the quite different purposes of the Sixth Amendment's right to counsel, which arises only after the commencement of proceedings and the Fifth Amendment's right to counsel, which exists whenever a suspect in custody requests a lawyer's help. The Court of Appeals, in writing its opinion, clearly did not share the Petitioner's confusion. Indeed, the Court of Appeals noted, (Pet.App. at 17, footnote 8), that Cervi had raised a Sixth Amendment challenge to his confession which need not be resolved because the Fifth Amendment violation was so clear. It may be worth noting, moreover, that were the Sixth

Amendment issue before the Court it would be a difficult one. Unlike Moran v. Burbine, 475 U.S. 412 (1986), which Petitioner cites, this is a case in which a suspect personally requested counsel, where judicial officer had acted on that request and when the authorities knew of his request when (before his confession) they embargoed his counsel. Evaluation of the conduct of the authorities in this case would require reaching the questions which Moran reserved, on a record which strongly argues that Mr. Cervi's fundamental rights were violated.

Someday this Court may be faced with a case which requires consideration of what right to counsel a non-custodial suspect possesses when facing an extradition hearing. In all likelihood, when the question must be faced it will be a complicated one. Typically, a suspect facing an extradition proceeding will be facing potential charges in both the demanding state (e.g., the murder in the case) and in the asylum state (e.g., weapons violations, possession of stolen property, traffic charges in this case). As the unanimous Court of Appeals found, however, this case does not require resolution of these problems; it simply requires a straightforward application of a well-settled and extremely valuable bright-line rule which consistently and efficiently guides the conduct of criminal justice professionals.

CONCLUSION

This Court should therefore refuse to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, which simply applied well-settled principles previously deided by this Court, and which presents no substantial question for review.

Respectfully submitted,

JAMES M. DOYLE
124-126 Warren Street
Roxbury, MA. 02119
617 4455640

GEORGE H. KENDALL
99 Hudson Street
16th Floor
New York, N.Y. 11103
212 219 1900

CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing opposition was mailed, postage prepaid, to Paula K. Smith, Esq., 132 State Judicial Building, 40 Capitol Square, Atlanta, Georgia, 30334, this 20th day of January, 1989.

James M. Doyle